

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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|                           |   |                          |
|---------------------------|---|--------------------------|
| UNITED STATES OF AMERICA, | : | 21-CR-265(PKC)           |
|                           | : |                          |
|                           | : |                          |
| -against-                 | : | United States Courthouse |
|                           | : | Brooklyn, New York       |
|                           | : |                          |
|                           | : | May 5, 2023              |
| YONG ZHU,                 | : | 11:30 a.m.               |
|                           | : |                          |
| Defendant.                | : |                          |

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TRANSCRIPT OF CRIMINAL CAUSE FOR SUPPRESSION HEARING  
BEFORE THE HONORABLE PAMELA K. CHEN  
UNITED STATES DISTRICT COURT JUDGE

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1 THE COURT: Criminal cause for suppression hearing,  
2 docket 21-cr-265, United States versus Yong Zhu.

3 Will the parties please state your appearances for  
4 the record, starting with the Government.

5 MS. ARFA: Good afternoon, Your Honor. Meredith  
6 Arfa for the Government. And with me at counsel table are  
7 AUSAs Craig Heeren, Irisa Chen, and also from NSG is Christine  
8 Bonomo.

9 THE COURT: Good afternoon to all of you.

10 MR. TUNG: Good afternoon, Your Honor. Your Honor,  
11 on the defense side, Kevin Tung on behalf of the defendant Zhu  
12 Yong. And sitting next to me is the defendant Zhu Yong, and  
13 then next to me is my law clerk Yutengz Tang, T-A-N-G. He is  
14 not admitted, but he is not speaking either.

15 THE COURT: All right. Good afternoon to all of you  
16 as well.

17 Let's have our interpreters be sworn in.

18 THE COURTROOM DEPUTY: Please raise your right hand.  
19 (Interpreters sworn.)

20 THE COURTROOM DEPUTY: Please state and spell your  
21 names and the language you will be interpreting.

22 THE INTERPRETER: My name is Brendan Chen. I am the  
23 Mandarin interpreter.

24 THE INTERPRETER: Nancy Wu, also the Mandarin  
25 interpreter.

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1 THE COURT: Good afternoon to both of you. We  
2 have -- I can't help but remark, we have four people with the  
3 last name Chen. Strange convergence. Probably all different  
4 in Chinese, I suspect.

5 We are here today for the argument on Mr. -- the  
6 last name Zhu; correct?

7 MR. TUNG: Yeah, the last name is Zhu.

8 THE COURT: Mr. Zhu's motion to suppress his  
9 post-arrest statements to the FBI agent.

10 As I said when we were off the record, Mr. Tung, the  
11 way that we will proceed is that you will make your arguments,  
12 since it is your motion, and then the Government will respond.

13 Go ahead. And be sure you speak slowly and clearly  
14 into the microphone, you can remain seated.

15 MR. TUNG: Thank you, Your Honor.

16 Okay. This motion is made on behalf of the  
17 defendant Zhu Yong to exclude statements and/or evidence  
18 obtained after the Government was in violation of his  
19 Miranda rights. That was -- I think that was in a video  
20 recording bearing Bates number YZ 0000002.

21 Now, Your Honor, primary speaking, we only actually  
22 have to focus on the first maybe five or six or seven minutes  
23 of the recording. And I do not know, Your Honor, if you would  
24 actually like to view the recordings, which I don't have it  
25 here, but I thought that it was going to be set up by the

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1 Court.

2 THE COURT: No. I have viewed the videos. Trust me.

3 MR. TUNG: Then I just start my argument.

4 THE COURT: That would be really bad if I hadn't  
5 before today.

6 MR. TUNG: Yes, Your Honor. It's actually, Your  
7 Honor, at the very beginning of the video, the agent present a  
8 waiver of the Miranda rights form to the defendant and asking  
9 him to sign that waiver and that's, I believe, if I do not  
10 remember wrong, it's around 2 minutes and 30 seconds in that  
11 timeframe and that was at the very beginning. So defendant  
12 was confused. So he said -- he basically request, through the  
13 interpreter, he wants to speak to an attorney. And according  
14 to the law, if the individual states that he wants an  
15 attorney, the interrogation must cease until an attorney is  
16 present or appointed. At that time the individual must have  
17 the opportunity to confer with the attorney and to have him  
18 present during any subsequent questioning. That's the essence  
19 of the Miranda versus Arizona case, 384 United States 436.

20 Now, if you still remember, at that point in time,  
21 the FBI agent actually did not stop and he continues to ask  
22 him to explain to him regarding that waiver. But that's not  
23 right because, Your Honor, there was nothing unclear when the  
24 defendant expresses that he wants to talk to an attorney, all  
25 interrogations must stop. There is no need to explain the

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1 waiver form because he wanted an attorney. It is crystal  
2 clear, but the agent continues to talk.

3 And at the second point in time, Your Honor, if you  
4 notice the video, I think that's around five minutes into the  
5 video, the defendant again, through the interpreter, he  
6 expressed his desire to an attorney. And even with that, he  
7 makes a gesture he wants to make a telephone, he says -- I  
8 want to talk to attorney and it was that gesture. I mean,  
9 Your Honor, I do not know if you noticed this. So at that  
10 point in time, the defendant -- that was the second time  
11 clearly he expressed his desire to have an attorney represent  
12 him.

13 Now, when his request was ignored by the agent for  
14 the few minutes, for the past few minutes and they continue to  
15 explain what this waiver form is -- okay, this might be the  
16 third time. I'm sorry, Your Honor. And there's a second  
17 time. The second time is four minutes into the video, okay.  
18 He told the interpreter -- he told the -- he told -- through  
19 the interpreter, he told the agent that he wants an attorney.  
20 So just I'm talking about the last time and he even made -- a  
21 gesture, and he said look, you know, if I can -- basically,  
22 he's telling the agent if you do not provide an attorney to  
23 me, maybe I can make a phone call at least.

24 So all these three times the request was crystal  
25 clear: He wants an attorney. He wanted to have an attorney's

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1 representation at least to guide him through the  
2 interrogations. The agent never stopped, continues to explain  
3 the form and asking him to sign this waiver form. Your Honor,  
4 clearly if the defendant express his desire to have an  
5 attorney, there is no need for the agent to continue to  
6 explain what this waiver form is. He's not going to waive,  
7 right.

8           Now, at the end, Your Honor, the defendant thought  
9 his request was refused. And the agent represents Government.  
10 So he was kind of -- even though not specifically under some  
11 force, so he signed, but he was under the impression he was in  
12 a small room, interrogation room with no help other than  
13 interpreter, right. Nobody -- it was very late at night. So  
14 he was kind of -- he was not knowingly, at least I know he was  
15 not knowingly or voluntarily sign the waiver form. Therefore,  
16 Your Honor, based on the evidence, based on the videotaping  
17 about just -- I mean, first, less than ten minutes  
18 videotaping, Your Honor, you should make a ruling suppress or  
19 exclude the Government to introduce any statements or any  
20 evidence they obtained in violation of the defendant's Miranda  
21 rights after, you know, he clearly, unequivocally expressed  
22 his desire to speak to an attorney or to have an attorney  
23 representing him in the proceeding. So all these statements  
24 should be suppressed.

25           Thank you very much, Your Honor.

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1 THE COURT: Okay. Thank you very much, Mr. Tung.

2 I'm actually going to save the Government some work  
3 here and be efficient because, as I said, I have reviewed the  
4 video and I have also thankfully had the benefit of the  
5 transcript that the Government provided so I can make a clear  
6 record.

7 I don't agree with your argument, Mr. Tung, that it  
8 is crystal clear that Mr. Zhu invoked his right to counsel.  
9 In fact, there is a lot of ambiguity in what he says when you  
10 view the entire context of the conversation and I'm fortunate,  
11 unusually fortunate, I think, to have the benefit of seeing  
12 him speaking and interacting with the agents and the  
13 interpreter. So I see the body language. I hear the tone. I  
14 hear the exact words. I know what the sequence of events was.  
15 I also hear the tone of the agents and their mannerism, which  
16 was throughout very professional and calm and deliberative.  
17 So your characterization -- and I understand why you must make  
18 this argument -- I simply disagree with.

19 I think that throughout, from the beginning until  
20 the end of this first -- about seven or eight minutes or so in  
21 the video, the whole sequence of events really transpires  
22 within the first ten minutes, as you noted, that it's clear to  
23 me at first Mr. Zhu might have been confused and was asking  
24 about the idea that he's entitled to a lawyer. But it is very  
25 clear to me then that the agents appropriately respond before

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1 we can even speak to you, we need to make sure that you  
2 understand all of your rights, not just your right to a  
3 lawyer, but all of your rights and that you are willing to  
4 speak to U.S.

5           So each time -- and there are three times where he  
6 said something that could be interpreted, but it's not a clear  
7 statement to me at all, that he's thinking he wants a lawyer,  
8 each time he does that, the agents properly, in my mind, and  
9 very professionally say to him let U.S. advise you exactly  
10 about what your rights are and then you can decide whether or  
11 not you want to speak to U.S. or not. And they, at least two  
12 times by my reckoning, say before we can even ask you anything  
13 we have to make sure you want a lawyer.

14           Now, I want to read into the record, with apologies  
15 to our long suffering and fabulous court reporter who has been  
16 with me since 10:30 this morning, the parts of the transcript,  
17 or the parts of the conversation, which thankfully have been  
18 transcribed by the Government in their submission, that I find  
19 showed that he was equivocal, at best, about whether he wanted  
20 a lawyer in that moment, and that rather what I interpret him  
21 to be saying and what seems clear to me from the context, both  
22 visually and aurally, he is trying to understand whether he  
23 needs to get a lawyer and he decides, though, after being  
24 advised of his rights, that he might need to get a lawyer, but  
25 that he says, very unequivocally, that he's willing to speak



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1 to the agents before then and then he signs the actual waiver  
2 with the benefit of the translation and the explanation of all  
3 the rights.

4 Let me go through the parts that I have relied upon  
5 and if you want to argue further on this, you can.

6 In the very beginning -- so this is at about -- and  
7 I'm going to use the timestamp that is on the actual video.  
8 So that is the realtime. At about 8:58 a.m., and actually it  
9 may be closer to 8:59 a.m., the seconds -- I didn't record the  
10 exact seconds, but it is in between that timeframe, he says --  
11 and this is through the interpreter, so it is the interpreter  
12 actually speaking -- well, he asked, he said that he has a  
13 right to have a lawyer. He ask about. And then one of the  
14 agents named Bruno cuts him off and says, So do you want U.S.  
15 -- so that's what I want to do is walk through those rights.  
16 And then there is some more conversation. And the defendant  
17 actually says, I don't want to -- sorry -- I don't know what  
18 you gonna ask me about; you got the wrong guy.

19 Okay. And then a little bit -- there's a little bit  
20 more back and forth. And then the defendant, through the  
21 interpreter, says I don't know what you're going to ask. And  
22 he mentioned I could have a lawyer here. So that's what you  
23 characterize as the second invocation of his right to a  
24 lawyer, but, again, I perceive as just him trying to  
25 understand what's going on and whether or not he should get a

1 lawyer, and then Agent Bruno responds well, there's a couple  
2 of rights. So before we ask you any questions, you must  
3 understand. So you have the right to remain silent and  
4 anything you say can be used against you in court. You have  
5 the right to talk to a lawyer for advice before we ask you  
6 questions.

7 And then the defendant says -- and this is, I think,  
8 the third invocation, you would say -- but I need to find a  
9 lawyer.

10 Bruno responds: So is that what -- you want to talk  
11 to a lawyer first or do you -- I mean, we need to understand  
12 whether you want to speak with U.S., understand your rights  
13 and waive those rights and we can ask you questions.

14 So, again, even though the defendant does mention  
15 the right to a lawyer, the agents, in my mind, appropriately  
16 try to understand if he is invoking, because it's not clear  
17 from what he says, and I infer that as well from my viewing of  
18 the conversation, or whether or not he's trying to understand  
19 what his rights are. And, so, the agents I think very calmly  
20 but persistently still try to explain to him what his rights  
21 are before determining if he's willing to speak to them  
22 without a lawyer, and that's what then ensues.

23 The defendant then says, But I need to know what  
24 you're going to ask me about before I decide whether I need a  
25 lawyer or not. So, he basically makes clear that he wants to

1 know what's being asked before he decides if he needs a  
2 lawyer. This is a conversation that occurs within two minutes  
3 of the sit-down and the interview.

4 And then the agent says: Well, can -- we'll finish  
5 the rest of these and then you can decide.

6 So, again, they are just discussing with him whether  
7 or not he wants to invoke his right to a lawyer before  
8 speaking to the agents. And then the defendant says something  
9 unintelligible, know what's going on, so I know whether I need  
10 a lawyer or not.

11 Again, he is expressing equivocation. He's  
12 expressing that he's processing whether he wants to have a  
13 lawyer or not. So those statements, coupled with the other  
14 statements about I need to find a lawyer or I have a right to  
15 a lawyer, to me makes clear, for lack of a better word, that  
16 he's still figuring out if he wants to speak to a lawyer or  
17 not.

18 And I recall that when he made his first statement  
19 he said he has a right to have a lawyer. That's the  
20 interpreter saying the defendant said he has a right to a  
21 lawyer, that the defendant was reading, or appeared to be  
22 reading the waiver sheet. And, so, he seemed to focus in on  
23 you have a right to a lawyer.

24 But, again, this is in the context of discussing  
25 whether or not he still wants to get a lawyer at that moment

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1 because the question is not whether he needs a lawyer down the  
2 road or has a right to a lawyer down the road; it is whether  
3 or not he wants to invoke his right before speaking to the  
4 agents or instead of speaking to the agents, I should say, at  
5 that moment and that's what the agents do within the first,  
6 you know, five or six minutes and in a manner that's entirely  
7 appropriate and responding, in my mind, to what is  
8 equivocation or perhaps a lack of understanding by Mr. Zhu of  
9 what his rights are. So they persist and they explain to him  
10 what his rights are.

11 So they say to him, So what's going on here is  
12 you've been arrested under an arrest warrant by the Eastern  
13 District of New York.

14 And then they go on to say, So we can't ask you any  
15 questions unless you understand your rights and that you're  
16 willing to answer our questions without a lawyer present. So  
17 they make clear to him that he has the right to ask for a  
18 lawyer before or instead of speaking to the agents.

19 The defendant responds Well, you can ask, but if I  
20 feel, I will answer. What I like, I will answer. But if I  
21 feel I don't want to answer certain questions, I'm not going  
22 to answer certain questions.

23 So at that moment he seems clear that he's not going  
24 to answer anything he doesn't want to answer.

25 The agent responds, Well, that's fair. That's fair.

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1 But I want to make sure again that we go through these rights  
2 because that's some of the ones that are at the bottom here.  
3 So I want to -- I'm going to read them again and make sure you  
4 understand each one.

5 And then the other agent says: Let U.S. go through  
6 them all and then we can talk.

7 And again the other agent says: Before we can ask  
8 you questions, you must understand those rights, before we ask  
9 you. And then there is something unintelligible. So, again,  
10 you have the right to remain silent. You don't have to say  
11 anything. Anything you say can be used against you in court.  
12 You have the right to talk to a lawyer for advice before we  
13 ask you any questions.

14 And then he says something else that ends up being  
15 incomplete because it's unintelligible, but it starts with You  
16 have a right to, and then the defendant says, You can ask.  
17 And then he says something unintelligible. Then I'll decide  
18 whether I need to call a lawyer.

19 So that's the second or third time he says once I  
20 hear what the questions are, I will decide if I need to call a  
21 lawyer.

22 But, again, the agents are trying to make him  
23 understand that he has to decide if he wants to have a lawyer  
24 before they ask him questions. So, they go round and round a  
25 bit on this. But then the agent says: We are going to keep

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1 going, all right?

2 And then the agent says: You have the right to have  
3 a lawyer with you during our questions. If you cannot afford  
4 a lawyer, one will be appointed for you before any questions  
5 if you wish. If you decide to answer questions now without a  
6 lawyer present, you have the right to stop answering at any  
7 time.

8 And I'm assuming that this is what the agent meant  
9 by what's at the bottom of the rights advisement -- advice  
10 form, and what the defendant himself was talking about, which  
11 is I'll answers the questions if I like and I won't answers  
12 the question that I don't like. And, so, the agents are  
13 advising him he can stop answering any questions if he decides  
14 to start answering them without a lawyer present.

15 And then Agent Thomas says, Does he understand? And  
16 Agent Bruno says, If you understand them and you still want to  
17 speak with U.S., you know, our next step is that we sign the  
18 form. Right?

19 And then the other agent, Thomas says, And then we  
20 can have the conversation with him and ask questions. Is he  
21 willing to do it? And obviously the agent is asking the  
22 translator to ask Mr. Zhu.

23 Mr. Zhu responds, Yeah, he say you can ask him  
24 whatever question you like, that's what I said.

25 And that's when he then signs the form.

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1           So, based on that entire conversation and what I  
2 consider initially equivocal statements by Mr. Zhu about  
3 whether or not he wants to have a lawyer present before any  
4 questioning or during any questioning or whether he was  
5 invoking his right to counsel at that point, it's clear to me  
6 that by the end of the conversation he clearly understands  
7 that he has a right to a lawyer before any questioning or  
8 during the interview and he declines to invoke that right and  
9 instead signs a waiver form.

10           I think this conclusion is buttressed by the fact  
11 that then he talks to the agents about two hours or so  
12 thereafter, much of which is exculpatory statements along the  
13 lines of you have the wrong guy. But he answers some  
14 questions that obviously the Government may be interested in  
15 that seem perhaps benign to Mr. Zhu but obviously may be  
16 relevant to the Government's case.

17           So, for all of those reasons, I find as a factual  
18 matter that Mr. Zhu didn't invoke his right to counsel, that  
19 his statements in the beginning, the three of them that the  
20 defense relies upon are equivocal, at best, and when  
21 considered in the broader context of the conversation,  
22 especially with the agents consistently reinforcing with him  
23 his right to counsel before any questions are asked, I find  
24 that he voluntarily waived his right to counsel and spoke to  
25 the agents.

1           Now, I do want to cite a couple cases that I think  
2 support the standard I'm applying and the conclusion: United  
3 States versus Plugh. In that case, the Second Circuit held  
4 that an interviewee's statement, "I don't know if I need a  
5 lawyer," coupled with his refusal to sign the waiver was  
6 insufficient to constitute an unambiguous request for counsel.  
7 So in that case, the interviewee didn't even sign the waiver  
8 form and expressed a question about whether he needed a  
9 lawyer. That is a far cry from what we have here, where the  
10 defendant executed the form and then said I'll talk to you  
11 about the questions I want to talk to you about and not about  
12 the ones I don't want to talk to you about, and also suggested  
13 that he needed to hear the questions before he sought a lawyer  
14 but then signed the waiver form.

15           Additionally, the case of United States versus  
16 Walters, which is I think a Judge Gershon case, she found  
17 there that a suspect's statement that he was going to get a  
18 lawyer, akin to Mr. Zhu saying I need to get a lawyer,  
19 speaking in the future, it would seem, was insufficient --  
20 that's what Judge Gershon found -- to constitute an  
21 unambiguous request for counsel. And that is U.S. versus  
22 Walters, 963 Fed. Supp 2nd 138 at 155. There is a quote about  
23 that. That is Eastern District of New York, of course, 2013.  
24 And in it Judge Gershon cites U.S. versus Scarpa, 897 F.2d 63  
25 at 68, a Second Circuit decision from 1990.



1 And what's also noteworthy about Judge Gershon's  
2 ruling in Walters is that she rejects the defense's argument  
3 under Smith versus Illinois in that somehow the prosecutor's  
4 decision there supported a finding of a waiver, I'm sorry, an  
5 invocation of the right and there she said -- hang on one  
6 second. I'm sorry. I'm just reminding myself about Smith.  
7 Yes. And she differentiated Smith, sorry, because in Smith,  
8 the Court did find that the initial statement was ambiguous  
9 and Judge Gershon, as I do here, found that the differences  
10 that I don't find and she didn't find the interviewee's  
11 initial statement was ambiguous and, therefore, it is a  
12 material difference from Smith v. Illinois, even though I  
13 understand that the defense isn't necessarily relying on that  
14 case.

15 Furthermore, there is a case of Davis, a Supreme  
16 Court decision. And I want to get the full cite actually.  
17 The cite is 512 U.S. 452, a 1994 Supreme Court decision, and  
18 the Government will probably help me out here, it is Davis  
19 versus United States. And in that case, the Supreme Court  
20 found ambiguous the statement "Maybe I should talk to a  
21 lawyer." So, again, further support for the conclusion that  
22 Mr. Zhu's statements, which are very similar, are ambiguous  
23 and not a clear invocation of his rights.

24 MS. ARFA: Your Honor.

25 THE COURT: Yes, please.

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1 MS. ARFA: May I just clarify?

2 I think while you were talking about the Walter's  
3 case and you were distinguishing Smith, you said that you  
4 found that the statement is -- I think you inverted ambiguous  
5 and unambiguous.

6 THE COURT: If I misspoke, I meant to say that as  
7 here -- sorry, as in Walters, I find that the defendant's  
8 statements were ambiguous. Sorry, not unambiguous.

9 MS. ARFA: Thank you.

10 THE COURT: All right. Thank you very much for  
11 that.

12 And the Government also cites a couple of other  
13 cases in its brief that are supportive: Wood v. Ercole, 644  
14 F.3d, 83, Second Circuit 2011, where the interviewee said  
15 something to the effect of perhaps I should get a lawyer or  
16 maybe I need a lawyer. So, again, the Circuit did not find  
17 that those statements were unambiguous invocations of the  
18 right to counsel.

19 So for all of those reasons, I am denying the motion  
20 to suppress. Although, I guess I did say, Mr. Tung, if you  
21 wanted to respond, you can. Did you want to say anything in  
22 response to what I have just said?

23 MR. TUNG: Just a few statements just to clear our  
24 position because in the event that Zhu decides to appeal so we  
25 have a complete record.

1           Your Honor, I respectfully disagree with the  
2 analysis here because the cases cited by people -- by the  
3 Government, or by the Court are clearly distinguishable,  
4 because in this case, in the instant case, the defendant at  
5 the very beginning, the first sentence, he asked -- he asks  
6 that he has a right to have a lawyer. He's not emphasizing  
7 perhaps I want to talk to lawyer. He's talking I have a right  
8 to a lawyer. This is in plain English, plain English. The  
9 FBI agent should have understood what the defendant wants, and  
10 this is exactly what the law is. Right. If the individual  
11 states that he wants an attorney, the interrogation must cease  
12 until an attorney is present.

13           So all these subsequent conversations the Court and  
14 the Government is tried to characterize them as a way to  
15 express or to clarify what defendant wants. This is actually  
16 not true, because what happens is the FBI agent here is trying  
17 to induce the defendant to sign this waiver and the benefit of  
18 the doubt should be given to the defendant, not the  
19 Government.

20           He already said at the very beginning I have a right  
21 to a lawyer. So Government should go and find a lawyer before  
22 they speak any more to that defendant. All the subsequent  
23 conversations which they tried to confuse this defendant and  
24 trap or trick him to sign the waiver here.

25           So, Your Honor, I mean, this is just my argument and

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1 I have nothing to do -- to disrespect the Court. All I'm  
2 saying I just want to leave this statement here, the position  
3 here just in the event, you know, the defendant wants to  
4 appeal.

5 THE COURT: As you should. I appreciate that.

6 I also, though, want to clarify that that first  
7 statement that you're focusing on, which the translator said  
8 he asked, he said that he has a right to have a lawyer, that's  
9 the one you're focused on, right?

10 MR. TUNG: Right.

11 THE COURT: As I said before, viewing the video,  
12 what I see the defendant doing is looking at the waiver form  
13 and he's almost pointing to a part of it to the translator and  
14 it's clear to me that he is reading the form, which I assume  
15 is in English and perhaps also in Chinese.

16 MS. ARFA: Chinese, Your Honor.

17 THE COURT: Yes. And he's trying to understand  
18 whether he has a right to a lawyer. I agree with you, that  
19 that's what he says, and it's clear he is trying to figure  
20 that out. But where I disagree with you is I don't think he  
21 is saying I want a lawyer here now, I'm not waiving my right  
22 to a lawyer.

23 And it's even more clear as the conversation goes on  
24 that the agents are trying to help clarify for him this  
25 statement in the waiver form that says you have a right to a

1 lawyer because the defendant was being arrested, was  
2 presumably new to the process, and it's clear to me that he  
3 looks somewhat confused. So I very much, after viewing the  
4 video and seeing exactly the context in which his statement  
5 arose, it is very clear to me that he's just trying to clarify  
6 what that statement in the waiver form means and that's what  
7 the agents do, is they go over it with him to explain exactly  
8 what it means. And they could not have been clearer with him,  
9 because they repeated multiple times, that before he spoke to  
10 them, he has a right to have a lawyer, and that even if he  
11 spoke to them without a lawyer, he could stop. So I don't  
12 think there was any trickery involved or any coercion,  
13 especially given the manner in which the agents dealt with  
14 him, which was entirely calm and conversational. And my  
15 perception was they were trying to be helpful to him in  
16 clarifying the process.

17 The other thing I want to say, too, though, when you  
18 say the benefit of the doubt should go to the defendant, I  
19 disagree slightly, and now we're just talking about policy.  
20 Remember that the suppression, the whole notion of suppression  
21 based on police misconduct is really meant to police bad --  
22 sorry to use that word again -- bad law enforcement conduct.  
23 But here I do not find in any way that the agents were trying  
24 to do anything coercive or nefarious; quite the opposite. I  
25 think they were really trying to understand and make the

1 defendant understand what his rights were and determine what  
2 he wanted to do. And at one point I remember one of the  
3 agents pausing in response to the defendant's statement -- and  
4 I forget which one it was -- I think he said I need to know  
5 what the questions are before I tell you if I need a lawyer,  
6 and I think, although it is not reflected here in the  
7 transcript, the agent says something like haaa, and you could  
8 see him processing what to do. It's a human response, a  
9 normal response, that they are trying to figure out what's the  
10 next appropriate step, and that, in my mind, they took it  
11 consistent with what Miranda dictates, that they try to advise  
12 him fully of all of his rights and then determine what he  
13 wanted to do.

14 So, your argument is preserved, to be sure. I just  
15 want to clarify, from a policy perspective, this notion of tie  
16 goes to the runner, or the benefit of the doubt goes to the  
17 defendant, I don't entirely agree with it in this setting  
18 because Miranda is a prophylactic rule, and it's really meant  
19 to curve behavior that is not this, in my opinion. I don't  
20 think the agents behaved in a way that warrants the sanction  
21 of suppressing the statements.

22 MR. TUNG: Your Honor, I just had one or two  
23 sentence to respond.

24 THE COURT: Yes.

25 MR. TUNG: Your Honor, actually, the law is to

1 invoke the Miranda rights to consult, right, it only requires,  
2 at a minimum, some statement that can reasonably be construed  
3 to be an expression of a desire for the assistance of  
4 attorney. So, in other words, I still go back to focus on the  
5 very first sentence, right, he said. Through the interpreter  
6 he asks he has a right to an attorney.

7 I think the Court should construe this is a minimum  
8 requirement that he already met; he wants to have the  
9 assistance of attorney. That cited case is Davis versus  
10 United States, 512 U.S. 452.

11 Now, Your Honor, if -- after Mr. Zhu stated I have a  
12 right to an attorney, the agent shouldn't talk about anything  
13 else if they really want to clarify his desire. They should  
14 go after -- they should follow up with the question do you  
15 need an attorney. It could be very simple, straightforward  
16 question: Was it like, you know, Mr. Zhu, do you need an  
17 attorney to assist you in the process? They go around  
18 focusing about this waiver and try to explain, you know, you  
19 have to sign this, you have to sign this. So all of these  
20 subsequent conversations should be construe as interrogation  
21 or some sort of misleading the defendant to end up finally to  
22 sign the agreement.

23 If he follow up with a very crystal clear, simple  
24 question, Mr. Zhu, do you need an attorney? Then he will be  
25 answering yes or no. That's missing here. That is missing

1 here. What they did was all these five or seven minutes of  
2 these talking. That's what I'm characterizing this as  
3 tricking the defendant. You have to understand the  
4 surrounding circumstances. That's exactly what Miranda case  
5 was talking about. The essence was a defendant was kind of  
6 locked in a small room with all surrounding assistants, with  
7 all surrounding -- there's nobody in the room except the  
8 interrogation, that environment. Most people will be scared.  
9 Most people will think whatever Government's demand they have  
10 the obligation to respond. This is exactly what had happened.  
11 It's not just the subsequent conversations. The subsequent  
12 conversations doesn't mean anything other than they already --  
13 this is kind of an interrogation, this is already questioning,  
14 you know, is my understanding this form. It's just for the  
15 record, Your Honor.

16 THE COURT: Thank you, Mr. Tung. Having seen the  
17 video, I disagree with you.

18 I do want to make a further note that actually the  
19 defendant made in the Smith case in Judge Gershon is I would  
20 like a lawyer. That's exactly what he said there, and Judge  
21 Gershon still didn't find in the context of that statement,  
22 that that was an invocation, an unambiguous invocation of his  
23 right to counsel.

24 Did the Government have anything to add?

25 (Continued on next page.)



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1 (Continuing)

2 MS. ARFA: I'm certainly happy to answer questions  
3 if the Court has any; otherwise, we are prepared to rest on  
4 our papers.

5 THE COURT: As I said, I'm denying the motion to  
6 suppress for the reasons I stated on the record. The defense  
7 has his objection.

8 And then we are proceeding to trial. I know I have  
9 a Rule 15 deposition issue to resolve.

10 I did want to mention that, Mr. Tung, I gave  
11 Defendants the right to respond by noon today, but you did not  
12 submit any response.

13 MR. TUNG: Your Honor, I'm here.

14 THE COURT: Multitask.

15 MR. TUNG: Your Honor, the only request here is I  
16 have nothing else to say other than if Government's request to  
17 take the deposition is granted, I concur with co-defendants'  
18 counsels' request, defendants' counsels' application for  
19 traveling cost. Because Mr. Zhu is not working, he cannot  
20 afford to pay to have the attorneys to attend the deposition  
21 in person in California.

22 THE COURT: But there can be a livestream link, so  
23 he doesn't have to go anywhere. He can watch it from his home  
24 or your office. And you can be present in your office too.

25 MR. TUNG: I'm talking about counsel, I'm talking

1 about attorney. He doesn't have to go, but I'm talking about  
2 the attorney going to attend the deposition in person because  
3 the Government's position, they will go there to attend the  
4 deposition in person. If the Defendants' attorneys are not  
5 there, that is a prejudice.

6 We do not know what the heck is going on with this  
7 similar room. What's the setting there? We do not know if  
8 FBI agents surrounded in that deposition room although it's  
9 not showing on video.

10 All I'm saying, it's not just my imagination. We  
11 have a right to be there. If they want to be there in person,  
12 we should be treated equally. That's the only objection I  
13 have, having them to pay the cost for Zhu's attorney, which,  
14 of course, I would be going there.

15 THE COURT: I'm curious, just because I have the  
16 Government here, and I realize the other Defendants aren't  
17 present, but the Government did submit a letter saying that  
18 the defense counsel took no position.

19 What happened between then and now?

20 I mean, to be honest, I wanted to be sure rather  
21 than rely on the Government's representation, not that I have  
22 any doubt that that was what was represented. But I'm curious  
23 now because it seems like there's some vociferous objection  
24 going on.

25 MS. CHEN: Seems like the Defendant took a position,

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1 Judge.

2 THE COURT: Let me ask you folks one question. And,  
3 again, we won't have a full discussion because the other  
4 lawyers are not here on the defense side.

5 But there was one suggestion of doing a -- what do  
6 they call it -- closed circuit livestream, I'll call it in the  
7 common parlance, of the testimony of the victim into the  
8 courtroom realtime.

9 Does the Government have a view on that?

10 MS. CHEN: Your Honor, I think the Government's  
11 concern there, without stating too many details on the record,  
12 was that the timing of the issues is a little unclear and the  
13 witness may or may not be available to do that at trial  
14 depending on --

15 THE COURT: Oh, understood, understood.

16 MS. CHEN: -- depending on how things play out.

17 THE COURT: Right, I understand.

18 MR. TUNG: Your Honor, you also have to consider  
19 Defendant's right: Cross-examination. That's the only thing  
20 in the deposition. We cannot cross exam.

21 THE COURT: So, I'm taking this under advisement.  
22 And, obviously, I have the benefit now of hearing from all of  
23 the Defendants, including Mr. Tung, who didn't submit  
24 something in writing but has expressed his views on the record  
25 here.

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1 I'm going to make a very prompt decision because I  
2 know time is of the essence. So, we'll take care of that; if  
3 not today, before the weekend is over.

4 MS. ARFA: I'm sorry, your Honor. Before we  
5 adjourn, I do have a couple other things I'd like to raise.

6 THE COURT: Relating to this motion, though?

7 MS. ARFA: For this proceeding, yes, your Honor.

8 THE COURT: Okay. Go ahead.

9 MS. ARFA: The first is we would like to move to  
10 seal the affidavit filed by the Defendant in connection with  
11 this motion. That affidavit was filed on April 20. It's  
12 Docket No. 179.

13 THE COURT: All right.

14 MS. ARFA: It contains identifying and sensitive  
15 victim information that we believe should not be on the public  
16 docket.

17 THE COURT: Okay. That will be sealed.

18 MS. ARFA: Thank you.

19 THE COURT: And I'm going to caution defense in  
20 general that you have to be more careful about filing on the  
21 public docket documents with personal identifying information.  
22 I think this has happened before in this case, if I'm not  
23 mistaken.

24 Am I being unfair to the defense? It might be  
25 another case that we have.

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1           MR. TUNG: I do not think we disclosed any personal  
2 information in this document.

3           THE COURT: Well, the name, right, of the victim?

4           MS. ARFA: I'm happy to discuss it with defense  
5 counsel separately, but we do believe it should be filed under  
6 seal.

7           MR. TUNG: I'm not objecting to be sealed, but I  
8 have not mentioned any person's name other than the Defendant  
9 himself.

10          MS. ARFA: I'm sorry, I'm not referring to the  
11 motion, I'm referring to the affidavit by the Defendant.

12          MR. TUNG: I still don't see anybody, but we can  
13 discuss. I'm not objecting, so we can discuss.

14          There's nobody's name revealed, only one witness,  
15 the victim, right? Victim, that's an attorney.

16          THE COURT: Is that the issue?

17          MS. ARFA: Yes, your Honor.

18          THE COURT: Let's actually stop speaking with names.  
19 I think that is a concern. And I'm not even sure the court  
20 reporter got it anyway, so why don't we just refer to the  
21 person as "the victim"?

22          In the transcription, there will just be a reference  
23 to "the victim." I assume that name is in this affidavit.

24          MS. ARFA: It is; for instance, Paragraph 6.

25          THE COURT: Okay. So, we're going to file that

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1 under seal without objection by defense.

2 It has already been done as we sit here.

3 MS. ARFA: Thank you.

4 THE COURT: Anything else?

5 MS. ARFA: Yes.

6 Setting aside this specific affidavit, the  
7 Government believes that at this point, having now produced a  
8 significant volume of both 3500 material and exhibits, that,  
9 pursuant to the protective order, we have designated sensitive  
10 discovery material, just to remind the defense that the  
11 protective order limits the dissemination of that material,  
12 including dissemination on the public docket. And that  
13 protective order, of course, has been signed by both the  
14 defense counsel and the Defendant.

15 THE COURT: And extended to the name that was  
16 disclosed?

17 MS. ARFA: Anything designated as sensitive  
18 discovery material should not be -- the protective order  
19 governs the dissemination in very specific and narrow ways,  
20 and that includes not filing that on the public docket.

21 THE COURT: So, Mr. Tung, you and your team should  
22 be reminded that you have to abide by the terms of that  
23 protective order regarding sensitive information. And when in  
24 doubt, obviously talk to the Government about whether you can  
25 file anything on the public record that you think might be

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1 covered by it. Just don't willy-nilly file anything that we  
2 have to then seal.

3 Do you understand?

4 MR. TUNG: Understood, your Honor.

5 THE COURT: It gets complicated in these cases.

6 Go ahead, Ms. Arfa.

7 MS. ARFA: Nothing further from the Government.

8 Thank you, your Honor.

9 THE COURT: Thank you.

10 Mr. Tung, anything else?

11 MR. TUNG: Nothing further from Defendant Zhu.

12 THE COURT: So, you'll be getting a ruling on the  
13 Rule 15 deposition shortly.

14 Thanks, everyone. Sorry again for keeping you  
15 waiting for so long.

16 MR. HEEREN: No problem. Thank you, Judge.

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18 (Matter concluded.)

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